Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

CHESLEY KARR, a minor, individually and JOHN R. KARR, individually and as next friend and Guardian-Ad-Litem on behalf of themselves and all others similarly situated,

Petitioners,

—v.—

CLIFFORD SCHMIDT, Principal of Coronado High School, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CLIFFORD SCHMIDT, Principal of Coronado High School, *et al.,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc,* entered in this case on April 28, 1972.

Citation to Opinions Below

The opinion of the United States District Court for the Western District of Texas, granting petitioners injunctive relief, is reported at 320 F. Supp. 728 and is set forth in the Appendix, *infra,* at pp. 1a-17a. The *en banc* decision of the United States Court of Appeals for the Fifth Circuit is not yet reported; it is set forth in the Appendix, *infra,* at pp. 29a-64a.

Jurisdiction

The judgment of the United States Court of Appeals, sitting *en banc*, was entered on April 28, 1972. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Question Presented

Whether a male high school student may constitutionally be denied a public education solely because he wears his hair at a length longer than allowed by a school board regulation.

Constitutional and Statutory Provisions Involved

United States Constitution:

First Amendment; Fourth Amendment; Ninth Amendment; Fourteenth Amendment.

Statement of the Case

On August 12, 1970, the petitioner, Chesley Karr, aged 16, was informed by the respondent Schmidt that he would not be allowed to register for his junior year at Coronado High School in El Paso, Texas, unless and until he conformed to that portion of the student dress code which limited the length of male students' hair (App., *infra*, pp. 1a, 30a).[1] Petitioner was a good student, active in extra-

[1] The regulation provided, in pertinent part, as follows:

Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not ob-

curricular activities, who had no disciplinary problems apart from the length of his hair (App., *infra*, p. 8a). After unsuccessfully exhausting administrative remedies, including a meeting with the El Paso School Board, the petitioner initiated this action in the United States District Court for the Western District of Texas on his own behalf and on behalf of all other students in the El Paso school system.[2] Premising jurisdiction on the civil rights statutes (28 U.S.C. Section 1343; 42 U.S.C. Section 1983), the petitioner sought declaratory and injunctive relief and money damages.

District Judge Suttle held an evidentiary hearing which lasted four days. He heard testimony from over thirty witnesses, including students, teachers, and school officials (App., *infra*, p. 35a). The evidence explored the genesis of the regulation and the purported justifications offered to support it so that the court could determine whether the regulation was "necessary to alleviate interference with the educational process" (App., *infra*, p. 5a).

School officials claimed that hair worn longer than permitted by the regulation causes distractions in and disruptions of classes. But the District Court surveyed the evidence and concluded that long hair itself "creates no more interference with the educational process than any of the myriad of personal idiosyncrasies of both male and female students which must be dealt with when young persons are gathered together for a common purpose" (App.,

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struct vision. No artificial means to conceal the length of the hair is to be permitted; i.e., ponytails, buns, wigs, combs, or straps.

[2] The court thereafter allowed the suit to proceed as a class action (App., *infra*, p. 3a).

infra, pp. 8a-9a). Indeed, the court found, the presence and enforcement of the rule "causes far more disruption of the educational process than the hair it seeks to prohibit" (App., *infra*, p. 8a). Nor did the evidence show that the wearing of long hair by young people is such a departure from societal norms as to be inherently distractive (App., *infra*, p. 9a).

School officials also claimed that the regulation was justified by considerations of health, but the court found that "the style in which one chooses to wear his hair has no relationship to habits of personal hygiene" (App., *infra*, p. 10a). Similarly, any safety hazards posed by long hair can be eliminated by methods of controlling hair when in laboratories or industrial courses (App., *infra*, p. 10a).

Finally, the court heard testimony on the claim that the regulation promotes "discipline." Although a greater percentage of students with disciplinary problems wore longer hair, there was no evidence that the latter caused the former or that the problems would be eliminated if shorter hair were worn (App., *infra*, p. 11a). To the extent that discipline is breached by harassment or assaults against boys with longer hair, the problems can be dealt with by disciplining the perpetrators not the victims (App., *infra*, p. 11a). The court also found that the teaching of discipline and of adherence to social norms is not advanced by the imposition of arbitrary rules. On the contrary, "enforcement of an unreasonable rule undermines respect for other rules and laws which are reasonable and deserve adherence" (App., *infra*, p. 12a).

The District Court summarized its factual conclusions as follows:

> In short, while the promotion of decorum, cleanliness, safety, tolerance, and discipline are reasonably related to and a vital part of our educational process, the Court finds, from a preponderance of the credible evidence presented by both sides, that the length of male students' hair is not. It is an irrelevant consideration and always has been. App., *infra*, p. 12a.

Based on these findings, the court reached two legal conclusions. First, it held that the regulation, which classifies male students on the basis of hair length and which denies a free public education to those with long hair, is "utterly unreasonable" and therefore a violation of the Equal Protection Clause (App., *infra*, p. 13a). Alternatively, the court held that "a high school student's individual choice of the manner in which he will present himself physically to the world so far at least as length of hair is concerned is a fundamental substantive right protected by the Due Process Clause of the Fourteenth Amendment . . ." and that the school officials had failed to meet their burden of justifying the infringement of that right (App., *infra*, pp. 13a-14a).

Accordingly, Judge Suttle entered judgment requiring that the petitioner and members of his class be enrolled in school, enjoining the enforcement of the hair regulation, and directing the expungement of disciplinary notations based upon the regulation.

The respondent school officials then appealed to the Fifth Circuit.[3] Prior to consideration of the appeal by

[3] The District Judge declined to grant a stay pending appeal, but a panel of the Fifth Circuit entered an order suspending the injunction (App., *infra*, pp. 21a-22a). Thereafter the petitioners applied to this Court for an order vacating the Fifth Circuit's

a panel, the Court directed that the case be heard *en banc* on briefs without oral argument.

Thereafter the Court entered its decision, reversing the District Court by a vote of 8 to 7 and sustaining the respondents' regulation.

Judge Morgan wrote for the majority, explicitly holding that within the plain meaning of the Constitution, there is no "constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer" (App., *infra*, p. 37a). The majority reasoned that the right to wear long hair cannot be assimilated to expression protected by the First Amendment, is not contained within the zone of constitutional privacy, and is not a fundamental personal liberty safeguarded by the Due Process Clause of the Fourteenth Amendment. In response to petitioners' equal protection claims, the majority held that the regulation had a rational basis and was reasonably intended to accomplish a permissible state objective.

Having ruled that the right claimed by petitioners was of marginal constitutional magnitude, the majority went on to announce a *per se* rule for District Courts in the Fifth Circuit to the effect that hair regulations are constitutionally valid. Henceforth, absent a claim of bad faith enforcement, any complaint challenging such a regulation will be summarily dismissed (App., *infra*, pp. 46a-48a).

Judge Wisdom wrote the primary dissenting opinion. Assuming that the Bill of Rights "does not provide an exhaustive list of the rights of the American people to

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stay. Justice Black denied the relief, writing a frequently cited in-chambers opinion. *Karr* v. *Schmidt*, 401 U.S. 1201 (1971) (App., *infra*, pp. 23a-26a).

freedom from governmental interference," he reasoned that restrictions on a student's hair style pose a significant and unjustified infringement on his liberty to hold himself out to the world in a particular and individual manner (App., *infra*, pp. 52a-55a). The dissent also faulted the majority's equal protection analysis which concluded that the regulation was reasonably intended to advance certain goals without refuting the District Court's finding that the classification based on length of hair had no fair and substantial relation to the goal of the regulation (App., *infra*, pp. 56a-62a). The dissent charged the majority with a "sleight of hand" "writing the Equal Protection Clause out of our Constitution" (App., *infra*, p. 62a).

Another dissenting opinion, written by Judge Godbold, would have upheld the District Court's findings and conclusions as not clearly erroneous (App., *infra*, pp. 62a-63a). Judge Roney would have invalidated the regulation as an unnecessary intrusion on the students' private lives (App., *infra*, pp. 63a-64a).

It is to review this divided *en banc* decision that petitioners seek certiorari.

Reasons for Granting the Writ

It is difficult to recall a question which has caused more division and disagreement among the Circuits than the issue tendered by the petitioners. Five Circuit Courts of Appeals have held that a student's right to determine the length at which he will wear his hair is a fundamental right entitled to substantial judicial protection. *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) ("We conclude that within the commodious concept of liberty, embracing

freedoms great and small, is the right to wear one's hair as he wishes." *Id.* at 1285); *Stull* v. *School Board of Western Beaver Jr.-Sr. High School,* —— F.2d —— (3rd Cir. April 13, 1972, No. 71-1674) ("[we] . . . hold that the governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment." Slip op. at 14); *Massie* v. *Henry,* 455 F.2d 779 (4th Cir. 1972) (the student's right to wear his hair as he wishes is "an aspect of the right to be secure in one's person guaranteed by the due process clause . . . but having overlapping equal protection clause considerations . . ." *Id.* at 783); *Breen* v. *Kahl,* 419 F.2d 1034 (7th Cir. 1969) (whatever its source, the right "clearly exists and is applicable to the states through the due process clause of the fourteenth amendment." *Id.* at 1036); *Bishop* v. *Colaw,* 450 F.2d 1069 (8th Cir. 1971) ("We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of our societal values, it commands the protection of the Fourteenth Amendment Due Process Clause." *Id.* at 1075). On the other hand, four Circuits, including the one below, have held that there is no such right and have suggested that the federal courts should not be bothered with adjudicating these issues. See *Jackson* v. *Dorrier,* 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970); *King* v. *Saddleback Junior College District,* 445 F.2d 932 (9th Cir.), *cert. denied,* 40 U.S.L.W. 3249 (1971); *Freeman* v. *Flake,* 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 40 U.S.L.W. 3468 (1972).

And now the Court below, the Circuit which first addressed the issue in *Ferrell* v. *Dallas Independent School District,* 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856

(1969), is as closely split internally as are the Circuits generally. The circle has turned full 'round and the issue is no closer to definitive resolution.

When there is such disagreement among the Circuits about whether a particular form of human conduct is entitled to protection against state regulation, then this Court has the obligation—as the tribunal at the apex of the federal judiciary, and as the ultimate arbiter of constitutional rights—to resolve the conflict. Judge Wisdom, dissenting below, said it best:

> The Supreme Court is responsible for ensuring that constitutional rights are uniform throughout this nation; it is hard to believe that the Court will close its eyes eternally to the disparate recognition now being given the constitutional rights of students who quite fortuitously inhabit different judicial circuits. App., *infra*, p. 51a, fn. 1.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Decision of the United States District Court for the Western District of Texas

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

EP-70-CA-229

CHESLEY KARR, a minor, Individually, and JOHN R. KARR, Individually and as next friend and Guardian *ad Litem*, on behalf of themselves and all others similarly situated,

v.

CLIFFORD SCHMIDT, Principal of CORONADO HIGH SCHOOL; H. E. CHARLES, Superintendent; HAROLD WIGGS, MRS. WILLIAM C. COLLINS, ELMAN A. CHAPA, JAVIER MONTEZ, and DR. R. A. D. MORTON, JR., THE BOARD OF TRUSTEES FOR THE EL PASO INDEPENDENT SCHOOL DISTRICT, Individually and in their respective official capacities.

MEMORANDUM OF DECISION

On August 12, 1970, plaintiff Chesley Karr, aged 16, was told he could not register as a Junior Student in Coronado High School until he conformed to that portion of the student "dress code" governing length of hair for boys. Principal Clifford Schmidt's action was approved by the Board of Trustees for the El Paso Independent School District after full hearing. Chesley Karr and his father John Karr, individually and as next friend and guardian ad litem, then

brought this action on behalf of themselves and others similarly situated against the Superintendent, Board of Trustees, and Principal Schmidt alleging that the regulation and its enforcement violates the plaintiffs' rights under the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiffs seek an injunction and damages under 42 U.S.C. § 1983 and declaratory relief pursuant to 28 U.S.C. §§ 2201 *et seq.*, alleging jurisdiction based upon 28 U.S.C. § 1343.

Defendants' preliminarily contend that (1) the complaint fails to allege a cause of action over which this Court has jurisdiction, (2) this Court lacks jurisdiction of the alleged cause of action because of plaintiffs' failure to exhaust their State administrative and judicial remedies, (3) this single-judge court lacks jurisdiction over the constitutional claims, since 28 U.S.C. §§ 2281 *et seq.* requires the convening of a three-judge federal district court, and (4) the case is not a proper class action. The Court finds that the Complaint alleges a non-frivolous cause of action raising substantial federal questions under 42 U.S.C. § 1983 over which this Court has jurisdiction under 28 U.S.C. § 1343. Defendants are proper parties, both in their official and individual capacities.[1]

The Court further holds that failure to exhaust available state judicial remedies is no jurisdictional bar to the instant action.[2] Nor is failure to exhaust available state administrative remedies. Federal courts require only "such prior reference to local institutional authority as may be necessary to assure that the action complained of is final

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[1] See *Harkless* v. *Sweeny Ind. School Dist.*, 427 F.2d 319 (5th Cir. 1970).

[2] *Moreno* v. *Henckel*, No. 28644, 5th Cir., September 23, 1970, specifically disapproving the holding in *Schwartz* v. *Galveston Ind. School District*, 309 F. Supp. 1034 (S.D. Tex. 1970).

within the institution in the sense that it is ripe for adjudication."[3] This has clearly been fulfilled in this case.

While the Complaint sought a declaration that §§ 21.301 and 23.26, Texas Education Code, are unconstitutional, it nowhere sought an injunction "restraining the action of any officer of [the] State in the enforcement or execution of such statutes."[4] Even this claim was abandoned on oral argument, leaving only the attack on a portion of a school board policy which, having only local effect, may be determined by a single district judge rather than a three-judge federal court.[5]

Since no specific evidence was offered as to the amount of money damages plaintiffs have suffered, that portion of the Complaint and its prayer must be dismissed. This being the case, the Court questions whether a formal ruling on the propriety of entertaining this suit as a class action is necessary, since any grant or denial of the declaratory and injunctive relief sought by the named plaintiffs would necessarily satisfy the alleged class. Since the point has been raised, briefed and argued, however, the Court holds that, in light of evidence as to how many students the "hair-cut" provision of the dress code has and potentially may affect, the requirements of Rule 23(a) and (b)(2), F.R.Civ.P., have been met, and that the named plaintiffs are entitled to bring this suit as a class action.[6]

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[3] *Stevenson* v. *Bd. of Educ. of Wheeler Co.*, 426 F.2d 1154, 1157 (5th Cir. 1970); see *Moreno* v. *Henckel, supra.*

[4] 28 U.S.C. § 2281; *cf.*, *Gunn* v. *University Committee*, 399 U.S. 383 (1970).

[5] *Vandygrift* v. *Home Rule Charter Comm'n*, 425 F.2d 255 (5th Cir. 1970); *Davis* v. *Francois*, 395 F.2d 730 (5th Cir. 1970); cases cited in Plaintiff's Brief on Three-Judge Court Requirements.

[6] *Lansdale* v. *Tyler Jr. College*, Civil Action No. 5201, E.D. Tex., October 9, 1970; and cases cited therein.

Defendants' Motion to Dismiss is therefore denied, and it is so ordered. To the extent that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Defenses are directed to the same issues, they are without merit.

Before examining the circumstances of this particular case, a brief, if perhaps over-simplified summary of "hair law" might be helpful. Following a course first charted in this circuit, most courts have either held or assumed that one's choice of hair style is constitutionally protected and that the State may invade this interest only upon a showing of compelling reason, *i.e.*, that the forbidden style, if allowed, would be a material and substantial interference to the educational system.[7] Consequently, hair-cut codes have been upheld where the school has objectively demonstrated that long hair resulted in disruptions of the educational process such as harassment, use of obscene or derogatory language, fights, health or safety hazards, obscene appearance or distraction of other students.[8] Conversely, if the school authorities were unable to support factually their rule, offering speculation only, the rule is held unreason-

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[7] See *Ferrell* v. *Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968).

[8] *Southern* v. *Bd. of Trustees, Dallas Ind. School Dist.*, Civil Action No. 3-4160-C, N.D. Tex., October 5, 1970; *Whitsell* v. *Pampa Ind. School Dist.*, Civil Action No. 2-908, N.D. Tex., September 8, 1970; *Pritchard* v. *Spring Branch Ind. School Dist.*, 308 F. Supp. 570 (S.D. Tex. 1970); *Wood* v. *Alamo Hts. Ind. School Dist.*, 308 F. Supp. 551 (W.D. Tex.), *aff'd*, No. 29814, 5th Cir., November 6, 1970; *Stevenson* v. *Wheeler Co. Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir. 1970); *Crew* v. *Cloncs*, 303 F. Supp. 1370 (S.D. Ind. 1969); *Davis* v. *Firment*, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1968); see *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir.), *cert. den.*, —— U.S. —— (1970).

able and hence in violation of the equal protection and/or due process clauses of the Fourteenth Amendment.[9] In short, "The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process." [10]

The policy of the Board of Trustees of the El Paso Independent School District regarding student dress was first codified in March, 1960.[11] The first specific reference to hair was added in September, 1967,[12] and remained substantially unchanged through amendments of the Board's Policy 5370

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[9] *Lansdale* v. *Tyler Jr. College, supra; Sims* v. *Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa 1970); *Miller* v. *Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969); *Calbillo* v. *San Jacinto Jr. College*, 305 F. Supp. 851 (S.D. Tex. 1969); *Westley* v. *Rossi*, 305 F. Supp. 706 (D. Minn. 1969); *Richards* v. *Thurston*, 304 F. Supp. 449 (D. Miss. 1969); *Griffin* v. *Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969), *aff'd in part, rev'd in part*, 425 F.2d 201 (5th Cir. 1970); *Zachry* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967); *Breen* v. *Kahl*, 296 F. Supp. 702 (W.D. Wisc.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. den.*, 398 U.S. 937 (1970).

[10] *Griffin* v. *Tatum, supra*, 425 F.2d at 203.

[11] "Pupils shall be properly dressed and groomed at all times. . . .

"No child shall be admitted to school or shall be allowed to continue in school who fails to conform to the proper standards of dress. (Articles 2780 and 2904 of Civil Statutes of the State of Texas)

"Failure to comply with the rules of dress shall be grounds for suspension."

[12] To the above was added, in relevant part, the following:

"High School Dress

"Acceptable for Boys

. . .

"4. Hair well-groomed."

"Not Acceptable for Boys

. . .

"3. Extreme hair styles which are too long or tend to be untidy."

in September, 1968,[13] and May, 1969.[14] Prompted by a request of the Superintendent's Student Advisory Committee in May, 1970, that the dress code be suspended for the remainder of the school year in order to gain empirical evidence of the necessity therefor, the Board of Trustees set up an Ad Hoc Committee on Student Grooming and Dress, composed of a student, parent, and administrator from each senior high school, to study the matter and recommend to the Board (1) whether a dress code is needed, and if so, (2) what the dress code should be for El Paso public schools.[15] After full discussion, the Board adopted the recommendation of the Ad Hoc Committee, with minor changes, July 24, 1970. As finally applied to students, the code reads, in its relevant parts, as follows:

"The matter of student grooming is of utmost concern to parents who realize the importance of seeing that children are properly attired when they leave for school each day. Also, student behavior is influenced by proper dress and grooming. Consequently, student grooming is the proper concern of school administrators and teachers.

"In order to help ensure proper acceptable behavior on the part of the students, it becomes necessary to estab-

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[13] Only relevant amendment reads:

"*Acceptable for Boys*

. . .

"4. Hair well-groomed and trimmed, clean shaven, and no sideburns below the middle of the ear."

[14] Allowed sideburns to extend to bottom of earlobe.

[15] Each committee member was given a packet of materials including the Sixth Circuit's opinion in *Breen* v. *Kahl, supra;* newspaper article reflecting denial of certiorari; editorial reflecting difficulty in getting job with long hair; and dress codes from school districts around the State of Texas.

lish certain guidelines to aid parents and students in selecting the proper attire for the school year. Schools also recognize that parents are basically responsible for their children's dress and general appearance. The role of the school is one of guidance for pupils in an effort for total education and the development of proper attitudes.

"Student dress will be considered acceptable if it does not violate any of the three following principles:

1. Clothing worn is not to be suggestive or indecent.
2. Clothing and general appearance is not to be of the type that would cause a disturbance or interfere with the instructional program.
3. Clothing and general appearance is to be such as not to constitute a health or safety hazard.

Guidelines for dress and grooming are:

. . . .

For Boys

1. Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. *No artificial means to conceal the length of the hair is to be permitted; i.e., ponytails, buns, wigs, combs, or straps.*

. . . .

"Cleanliness of body and clothing is expected of all students at all times.

"No child shall be admitted to school or shall be allowed to continue in school who fails to conform to the proper standards of dress.

"Failure to comply with the rules of dress shall be grounds for suspension." [16]

At the trial, plaintiff Chesley Karr's hair, while clean, neat, and well-groomed, was over the collar of his dress shirt in back and covered most of his ears. This is the only reason he was and is not permitted to enroll in Coronado High School[17] and delimits the only issue in the case.

Defendants' witnesses, including three students who served on the Ad Hoc Committee, a football coach, a science teacher, two typing teachers, two Student Activities Directors, three Assistant Principals, four Principals, and the Superintendent, offered their opinions that the regulation limiting the length of male students' hair is necessary to prevent interference with the educational process. Hair longer than the code permits is said to bear a reasonable relationship to distractions in and disruptions of classes, health and safety of students, and discipline.

The overwhelming preponderance of the relevant, credible evidence in the case indicates, however, that the presence and enforcement of the hair-cut rule causes far more disruption of the classroom instructional process than the hair it seeks to prohibit. To the extent that the alleged disruptions and distraction of others were not caused by the rule itself, long hair creates no more interference with the educational process than any of the myriad of personal

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[16] Arts. 2780 and 2904, Civil Statutes of the State of Texas, cited as authority, are now §§ 23.26 and 21.301, Texas Education Code (1969), respectively. The italic portions of the above were added to the Board's Policy 5370 as Administrative Regulations.

[17] Indeed, the evidence shows that plaintiff Chesley Karr was a good student, participated and represented his school in extra-curricular activities, and had no discipline problems except one prior occasion when he was told to cut his hair. His physical appearance and demeanor in court were exemplary.

ideosyncracies of both male and female students which must be dealt with when young people are gathered together for a common purpose. Similarly, the theory that deviation from the norm of hair styles for male high school students *per se* creates distraction is bootstrapped by the rule itself which creates the norm, deviation from which supposedly causes distraction. To the extent the rule does not establish the norm, this Court, from the evidence in the case and current periodicals, cannot find that hair on young people in excess of that allowed by the rule so deviates from the societal norm in male hair styles, if in fact there is one any more, as to be distractive.[18] The Court finds that the style in which a male high school student wears his hair has such a tenuous and speculative relationship to any material or substantial distraction or disruption of the educational or instructional process as to render any rule regarding length of hair based upon such a relationship, if any, unreasonable.

Health considerations include the possibility of a longer-haired male student being a health hazard to others because long hair is harder to keep clean than short hair and the possibility of his being a health hazard to himself because longer hair is harder to get dry after washing it than short hair. There was also testimony that longer-haired male students naturally smell worse than their shorter-haired counterparts. As to cleanliness and odor, the dress code specifically provides that "Cleanliness of body . . . is expected of all students at all times." Enforcement of this

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[18] While the contrary may have been true in Dallas in 1966, see *Ferrell* v. *Dallas Ind. School Dist.*, *supra*, and today in Pampa, see *Whitsell* v. *Pampa Ind. School Dist.*, *supra*, all courts have emphasized the necessity for a case-by-case approach, viewing the issue on the particular facts, circumstances and evidence of each case, and this opinion is so limited.

requirement would make the length of hair irrelevant to general cleanliness. The Court further finds that the style in which one chooses to wear his hair has no relationship to habits of personal hygiene one develops through parental training and peer-group influence. Female students have traditionally kept long hair clean. Male students desiring long hair can and should learn to do the same. Requiring them to cut their hair neither teaches this lesson nor eliminates its need. The same is true regarding the speculation that longer-haired male students, in learning the lessons of cleanliness, expose themselves to illness. Length of hair is simply irrelevant to the goal sought or the teaching of the means of obtaining it.

Safety in science laboratories presents a similar situation. The goal is laudable, but requiring short hair is simply not reasonably related enough to the problem to be a sustainable solution. The preponderance of the credible evidence indicates, and this Court finds that male students, like females, can and do develop means by which their long hair may be controlled so as not to create a safety hazard in science laboratories. There was no evidence of long hair actually causing injury in any science class, except for one student who purposefully ignited his own coiffure. The speculation offered simply does not comport with reason.

A tangent of the safety argument, originating with the Ad Hoc Committee, is that conforming hair styles for male high school students is necessary to protect them from non-students, since it enables school administrators to readily distinguish the shorter-haired students from the "long-haired, outside influences" which might do them harm. The Court finds that even if there were a real need for such swift identification, which there is not, requiring the "threatened" group to conform to a rule in violation of

their own taste and wishes and right to choose their own style of hair is no more a valid solution to such problem than the State requiring all non-students to wear long hair so as to be readily identifiable. Assuming that "outside influences" need be kept off school campuses and away from students, the Court finds that the style in which male high school students wear their hair has no reasonable relationship to the goal sought.

The justification of "discipline" has many facets. First, there is evidence in the case that a greater percentage of students referred to the school administration for discipline have hair bordering on or in violation of the code than does the student population as a whole. Yet there is no credible evidence that the longer hair caused the discipline problems or that specific discipline problems of a student would have been avoided had his hair been shorter. The Court finds, from a preponderance of the credible evidence, to the contrary. To the extent short-haired boys have had to be disciplined for harassing and/or assaulting those with longer hair, we again see the need for specific solutions to specific problems, as with health and safety above. The teaching of tolerance is reasonably related to the disturbance; the length of hair is not.

From specific discipline problems, we proceed to the general proposition advanced by virtually all of defendants' witnesses that a rule such as the one here attacked must be obeyed simply because it is there. Since there are rules in society, it is a valid and reasonable function of the educational process to require and teach that the rule should and must be obeyed. Besides the fact that such an argument would justify any rule, regardless of how unreasonable, arbitrary, or capricious, the Court finds, from the preponderance of the evidence in the case, that, again, requir-

ing adherence to the hair-cut rule is not reasonably related to the professed goal. Instead of teaching respect for society's laws or rules, enforcement of an unreasonable rule undermines respect for other rules and laws which are reasonable and deserve adherence. At best, the rule here attacked teaches only conformity and unreasoning submission to authority; at worst it results in disrespect for all rules and distrust of authority.[19]

In short, while the promotion of decorum, cleanliness, safety, tolerance, and discipline are reasonably related to and a vital part of our educational process, the Court finds, from a preponderance of the credible evidence presented by both sides, that the length of male students' hair is not. It is an irrelevant consideration and always has been. This country was founded by,[20] and has continually paid homage to long haired males.[21] We are confronted at every turn with scientists, artists, writers, and others with long hair who are likewise honored by this country and others, not to speak of jurists who feign long hair by way of a wig to enhance their appearance of dignity.[22] It is too late to substitute demeaning conformity to a School Board's idea of

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[19] The Tenth Defense urges the *in loco parentis* position of the school as justification for the regulation. In the absence of any other justification, the doctrine of *in loco parentis* has no applicability where, as here, the parents agree with the child rather than the school. See *Breen* v. *Kahl, supra*, at 419 F.2d at 1037-1038.

[20] See *Lansdale* v. *Tyler Jr. College, supra*.

[21] Our currency reflects hair styles which would offend the regulation here in question on the $1, $2, $5, $10, $20, $100, $500, $5,000, and $10,000 bills. Postage stamps in the last two regular series reflect these same styles and others.

[22] This is not to indicate that long-haired men are necessarily good, talented, or anything else. The point is that length of hair is irrelevant to any classification other than ability to grow hair.

proper appearance for the principles of individual freedom and responsibility upon which this country was built and will hopefully be maintained.

In Texas a free public education is not simply a privilege; it is a right guaranteed by the Texas Constitution.[23] Under the Equal Protection Clause of the Fourteenth Amendment, as well as a corresponding provision in the Texas Constitution,[24] any distinction between those who receive this right and those who do not must have a reasonable basis and must reasonably relate to the purpose for which the classification is made. The facts of this case simply fail to reveal any reasonable basis for granting the right of a public education to those with hair above their ears and collar and denying it to those whose hair is longer. The distinction drawn has no reasonable relationship, from the evidence in the case, to its professed purposes or to the educational process as a whole. The overwhelming preponderance of evidence shows, and the Court finds, that the classification of male high school students on the basis of the length of their hair is utterly unreasonable and hence in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[25]

The Court also holds that a high school student's individual choice of the manner in which he will present himself physically to the world so far at least as length of hair is concerned is a fundamental substantive right protected by the Due Process Clause of the Fourteenth Amendment to

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[23] Tex. Const. Art. VII, § 1.

[24] *Id.* Art. I, § 3.

[25] See *Miller* v. *Gillis, supra; Calbillo* v. *San Jacinto Jr. College, supra; Westley* v. *Rossi, supra; Griffin* v. *Tatum, supra, aff'd,* 425 F.2d at 203; *Zachry* v. *Brown, supra.*

the United States Constitution. In the words of Chief Judge Johnson, in which this Court fully concurs:

> ". . . Although there is disagreement over the proper analytical framework, there can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance. Indeed, the exercise of these freedoms is highly important in preserving the vitality of our traditional concepts of personality and individuality. In this connection Judge Doyle observed in Breen v. Kahl, supra:
>
> > 'An effort to use the power of the state to impair this freedom must also bear "a substantial burden of justification," whether the attempted justification be in terms of health, physical danger to others, obscenity, or "distraction" of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human "being". It would violate a basic value "implicit in the concept of ordered liberty."'
>
> "In short, the freedom here protected is the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification. Thus, one may not have the right to walk nude down the median strip of a busy highway. But, until one's appearance carries with it a substantial risk of harm to others, it should be dictated by one's own taste or lack of it." [26]

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[26] *Griffin* v. *Tatum, supra,* 300 F. Supp. at 62.

Not only have defendants failed to sustain such a substantial burden, but the Court finds, from the preponderance of relevant credible evidence, that in fact there is no reasonable relationship between the length of male high school students' hair and any alleged disruption of the educational process it is defendants' duty to maintain. This is not a case where the state supported factually the connection between its interest and the regulation in question.[27] Nor is this a case where the state's evidence was uncontroverted.[28] This Court has studied the evidence offered by both sides with utmost care, made its credibility choices, including the weighing of opinions offered by both sides for expertise and underlying basis, and has found nothing to justify the regulation here attacked but undifferentiated and unrealized fears and speculations. A substantial preponderance of the credible evidence establishes that the justifications urged are in fact unreasonable and that the regulation does more harm than good. Finding no reasonable relationship between the forbidden hair style and the educational process, the regulation dictating same is an unjustified infringement of a constitutionally protected right in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[29]

Defendants' efforts to provide the Constitutionally mandated efficient system of public free schools is commendable, as is their effort to include high school students in the regulatory process. This Court recognizes the wide discretion school authorities must have with respect to problems and

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[27] See, *e.g.*, cases cited note 8, *supra*.

[28] See, *e.g.*, *Griffin* v. *Tatum*, *supra*, 425 F.2d at 203-204.

[29] See *Sims* v. *Colfax Community School Dist.*, *supra*; *Westley* v. *Rossi*, *supra*; *Richards* v. *Thurston*, *supra*; *Breen* v. *Kahl*, *supra*.

situations arising in the administration of such schools.[30] They should and must provide and enforce rules and regulations which ensure an effective educational system by minimizing distractions, disruptions, health and safety hazards, and discipline those who are in fact guilty of such transgressions. The regulation before the Court, however, punishes the guilty and innocent alike.

The preamble to the Student Dress Code, Policy 5370, is substantially correct, and the three "principles" which follow it should remain inviolate. The "guidelines" which then follow are clearly helpful "to aid parents and students in selecting the proper attire for the school year" as the Board of Trustees' suggestion, leaving "parents . . . basically responsible for their children's dress and general appearance." But "guideline" No. 1 for boys may justifiably remain only that: a guideline. It may not be used under the Constitution to prevent a child from being admitted to school or to continue in school, nor as grounds for suspension. A student's right to a public free education in Texas and his right, along with his parents, to choose the length of his own hair, both protected by the Fourteenth Amendment to the Constitution of the United States, prohibit it.

Accordingly, a Judgment will issue enjoining defendants, their agents and successors in office, and all those acting in concert with them, from refusing to enroll plaintiff Chesley Karr and all those similarly situated in any El Paso Public School for the reason of length of hair, and from further enforcing Guideline No. 1 for boys, of Policy 5370. In light of the possible need for the use of "artificial means" of controlling hair to eliminate safety hazards, enforcement of the Administrative addendum to that portion of Policy

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[30] See, *e.g.*, *Wood* v. *Alamo Hts. Ind. School Dist.*, *supra*, 308 F. Supp. at 552, 554.

5370 will also be enjoined. The school records must be either expunged of evidence of suspension or absences or made to conform to this opinion by stating that any suspension was based upon an invalid regulation and that absences are therefore excused. In light of the testimony that plaintiff Chesley Karr has obtained the textbooks for the courses he would have taken this fall and, with the aid of private tutors, made effort to keep abreast of the regular curriculum, he must be enrolled as a Junior Student at Coronado High School and allowed to proceed as if initially enrolled at the beginning of the year. Defendants shall give plaintiff Chesley Karr a reasonable time to make up the academic work he has lost by reason of the illegal refusal to enroll him at the beginning of the year, and cooperate with him in doing so. The Judgment entered in accordance herewith shall be final.[31]

Entered this 19th day of November, 1970.

D. W. SUTTLE
United States District Judge

A true copy of the original, I certify.

DAN W. BENEDICT, *Clerk*

By: JEANNE BOYKIN, *Deputy*

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[31] This Memorandum of Decision is entered in lieu of findings of fact and conclusions of law, pursuant to Rule 52(a), F.R.Civ.P.

Judgment of the United States District Court for the Western District of Texas

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

EP-70-CA-229

CHESLEY KARR, a minor, Individually, and JOHN R. KARR, Individually and as next friend and Guardian *ad Litem*, on behalf of themselves and all others similarly situated,

v.

CLIFFORD SCHMIDT, Principal of CORONADO HIGH SCHOOL; H. E. CHARLES, Superintendent; HAROLD WIGGS, MRS. WILLIAM C. COLLINS, ELMAN A. CHAPA, JAVIER MONTEZ, and DR. R. A. D. MORTON, JR., THE BOARD OF TRUSTEES FOR THE EL PASO INDEPENDENT SCHOOL DISTRICT, Individually and in their respective official capacities.

JUDGMENT

On the 9th through the 12th days of November, 1970, came on for trial before the Court the above styled and numbered cause, and the Court having considered the files and records of the case, evidence adduced at the trial, and comments of counsel, and in accordance with the Memorandum of Decision on file herein, enters the judgment following:

It is ORDERED, ADJUDGED and DECREED that the defendants Clifford Schmidt, individually and as Principal of Coronado High School, H. E. Charles, individually and as Superintendent of the El Paso Independent School District, Harold Wiggs, Mrs. William C. Collins, Orba Lee Malone, Paul H. Carlton, Elman A. Chapa, Javier Montez, and Dr. R. A. D. Morton, Jr., individually and as members of the Board of Trustees for the El Paso Independent School District, their agents and successors in office, and all those acting in concert with them, be and they are hereby enjoined from:

1. Refusing to enroll plaintiff Chesley Karr as a Junior Student in good standing at Coronado High School;

2. Enforcing any further guideline No. 1 for boys of the Board's Policy 5370, including the Administrative Regulations added thereto, to deny admittance to or continuation in school or as grounds for suspension therefrom;

3. Maintaining evidence on school records of suspension or absenses by reason of violation of said guideline without the explanation that such suspensions or absences were due to enforcement of a regulation later held invalid;

4. Imposing any type of penalties or withholding any privilege or allowing any prejudice from such suspensions or absences;

5. Failing to allow plaintiff Chesley Karr every reasonable opportunity to complete the current semester's work on schedule, or to give reasonable time to make up any academic work lost by reason of his being denied enroll-

ment August 12, 1970, and failing to cooperate with him in so doing.

Entered this 19th day of November, 1970.

D. W. SUTTLE
United States District Judge

A true copy of the original,
I certify.

DAN W. BENEDICT, *Clerk*
By: JEANNE BOYKIN, *Deputy*

Order of the United States Court of Appeals for the Fifth Circuit Granting Appellants' Motion

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 31045

CHESLEY KARR, a minor, Individually and JOHN R. KARR, Individually and as next friend and Guardian *ad Litem* on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

versus

CLIFFORD SCHMITT, Principal of CORONADO HIGH SCHOOL, *et al., etc.,*

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before BELL, AINSWORTH and GODBOLD, *Circuit Judges.*

By the Court:

IT IS ORDERED that appellants' motion to stay and suspend injunction pending appeal, filed in the above styled and numbered cause, is hereby granted.

Order of the United States Court of Appeals for the Fifth Circuit Denying Appellees' Motion

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 31045

CHESLEY KARR, a minor, Individually and JOHN R. KARR, Individually and as next friend and Guardian *ad Litem* on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

versus

CLIFFORD SCHMIDT, Principal of CORONADO HIGH SCHOOL, *et al., etc.,*

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before BELL, AINSWORTH and GODBOLD, *Circuit Judges.*

By the Court:

IT IS ORDERED that appellees' motion to vacate stay of injunction pending appeal, filed in the above styled and numbered cause, is hereby DENIED.

Order Denying Motion to Vacate Stay of Injunction

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1970

CHESLEY KARR, a minor, Individually, and JOHN R. KARR, Individually and as next friend and Guardian *ad Litem*, on behalf of themselves and all others similarly situated,

v.

CLIFFORD SCHMIDT, Principal of CORONADO HIGH SCHOOL; *et al.*

On Motion to Vacate a Stay of Injunction Pending Appeal.

[February 11, 1971]

MR. JUSTICE BLACK, *Circuit Justice.*

This "Emergency Motion to Vacate a Stay of Injunction Pending Appeal" has been presented to me as the Supreme Court Justice assigned to the Court of Appeals for the Fifth Circuit. The motion concerns rules adopted by the school authorities of El Paso, Texas, providing that school boys' hair must not "hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision." The rules also provide that boys will not be admitted to or allowed to remain in school unless their hair meets this standard. The United States District Court for

the Western District of Texas, El Paso Division, held after hearings that this local student hair length rule violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and enjoined its enforcement, declining to suspend its injunction pending appeal. On motion of the school authorities, the Court of Appeals for the Fifth Circuit stayed and suspended the District Court's injunction and the student appellees have asked me to vacate the Court of Appeals' stay of the injunction. Should I vacate the stay the El Paso school authorities would remain subject to the District Court's injunction and would thereby be forbidden to enforce their local rule requiring public school students not to wear hair hanging over their collars or obstructing their visions.

I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run

their school system in accordance with their own best judgment as to the appropriate length of hair for students.

The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States.

Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

Application denied.

Order of the United States Court of Appeals Directing en Banc Hearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 31045

CHESLEY KARR, a minor, Individually and JOHN R. KARR, Individually and as next friend and Guardian *ad Litem* on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees.

versus

CLIFFORD SCHMITT, Principal of CORONADO HIGH SCHOOL, *et al., etc.,*

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(December 17, 1971)

Before BROWN, *Chief Judge,* WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, *Circuit Judges.*

By the Court:

The Court on its own motion having determined to consider this cause en banc, IT IS ORDERED that the submission of this cause to the panel of Judges Thornberry, Morgan and Clark is hereby vacated, and the cause shall be heard en banc on briefs without oral argument. The Clerk shall fix a briefing schedule for filing supplemental briefs.

En Banc Decision of the United States Court of Appeals for the Fifth Circuit IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 31045

CHESLEY KARR, a minor, Individually and JOHN R. KARR, Individually and as next friend and Guardian-Ad-Litem on behalf of themselves and all others similary situated,

Plaintiffs-Appellees,

versus

CLIFFORD SCHMIDT, Principal OF CORONADO HIGH SCHOOL, ET AL., Etc.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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(April 28, 1972)

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

MORGAN, Circuit Judge: This is another of the multitude of lawsuits which have recently inundated

the federal courts attacking hair length regulations promulgated by local public school authorities.

Appellee Chesley Karr is a sixteen-year-old student at Coronado High School in El Paso, Texas. On August 12, 1970, Karr attempted to enroll for his junior year at that school but was not permitted to do so because he was in violation of a school board regulation limiting the length of male students' hair.[1] After several

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[1]In March 1960, the Board of Trustees of the El Paso Independent School District first adopted a general good grooming regulation for all public school children. This grooming regulation was amended in September, 1967; September, 1968; and May, 1969. In May, 1970, the Student Advisory Committee to the Superintendent of Schools expressed dissatisfaction with the grooming regulation. In response, the Board of Trustees established in Ad Hoc Committee on Student Grooming and Dress, composed of a student, parent, and administrator from each of the El Paso Public High Schools to determine whether a grooming code was needed for the El Paso schools and what the content of the code should be. The committee recommended and the School Board adopted the code which is the subject of this suit. The code provides, in pertinent part, as follows:

> The matter of student grooming is of utmost concern to parents who realize the importance of seeing that children are properly attired when they leave for school each day. Also, student behavior is influenced by proper dress and grooming. Consequently, student grooming is the proper concern of school administrators and teachers.
>
> In order to help ensure proper acceptable behavior on the part of the students, it becomes necessary to establish certain guidelines to aid parents and students in selecting the proper attire for the school year. Schools also recognize that parents are basicaly responsible for their children's dress and general appearance. The role of the school is one of guidance for pupils in an effort for total education and the development of proper attitudes.
>
> Student dress will be considered acceptable if it does not violate any of the three following principles:

conferences with school board officials proved futile. Karr filed suit in federal court seeking injunctive and declaratory relief.

After a four-day trial, the district court concluded that the denial of a free public education to Karr on the basis of this regulation violated the due process and equal protection guarantees of the Federal Constitution. The court enjoined school board officials to enroll Chesley Karr and to refrain from enforcing the hair-length regulation.

On motion of the school authorities, this court stayed the district court's injunction pending appeal. Karr then petitioned the late Mr. Justice Black in his capacity as Circuit Justice for the Fifth Circuit to vacate the stay of injunction pending appeal. Mr. Justice Black denied the petition, observing:

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1. Clothing worn is not to be suggestive or indecent.
2. Clothing and general appearance is not to be of the type that would cause a disturbance or interfere with the instructional program.
3. Clothing and general appearance is to be such as not to constitute a health or safety hazard.

Guidelines for dress and grooming are:

. . . .

FOR BOYS

1. Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted, i.e., ponytails, buns, wigs, combs or straps.

. . .

Cleanliness of body and clothing is expected of all students at all times.

No child shall be admitted to school or shall be allowed to continue in school who fails to conform to the proper standards of dress.

[illegible] direct, positive command about local school rules with reference to the length of [illegible] school students must have. And I cannot now predict this court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school systems in accordance with their own best judgment as to the appropriate length of [illegible] for students.

* * * *

[illegible] there can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy require the length of [illegible], but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with [illegible] than are the local school authorities and state legislatures of all the fifty States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of [illegible] without [illegible].

The appeal from the district court's judgment is now before this court on the merits. Believing, as did Mr. Justice Black, that appellee Ezell's asserted right to be free of school requirements governing the length of [illegible] is one that is not cognizable in federal courts, we reverse with direction that the case be dismissed.

for failure to state a claim for which relief can be granted.

I.

The Fifth Circuit first considered the constitutional validity of hair length regulations in *Ferrell v. Dallas Independent School District*, 5 Cir., 1968, 392 F. 2d 697, cert. den. 393 U.S. 856. That case involved a factual context closely paralleling the case at bar. The plaintiffs were high school students barred from school by a hair-length regulation similar to that utilized by Coronado High School in the instant case. In its opinion, the court assumed without deciding that "a hair style is a constitutionally protected mode of expression",[2] but concluded that school authorities might place restrictions upon this "right" if those restrictions served "compelling" state interests. The court held that the interest of the state "in maintaining an effective and efficient school system" was a compelling state interest sufficient to justify the regulation.[3]

Since *Ferrell*, the circuit has considered high school hair and grooming regulations in numerous other cases. In each of these cases, except one, the validity of such regulations was affirmed in this court.[4] In one

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[2] 392 F. 2d at 702.

[3] Id. at 703.

[4] See Wood v. Alamo Heights Indep. School Dist., 5 Cir. 1970, 433 F. 2d 888, aff'g. per curiam 305 F. Supp. 516; Freeman v. Board of Educ., 5 Cir. 1970, 426 F. 2d 1158, cert. den. 400 U.S. 907 (1970); Dunn v. Fleming, 5 Cir., 1969, 408 F. 2d 1083, aff'g. per curiam 300 F. Supp. 1088; Westwell v. Parma Indep. School Dist., 5 Cir. 1971, 449 F. 2d 1188, aff'g. per curiam 310 F. Supp.

case, *Dawson* v. *Hillsborough County School Board*, 5 Cir., 1971, 445 F. 2d 308, this court affirmed a district court finding that a local school hair regulation was unconstitutional because it was unrelated to legitimate school board objectives.

II.

The district court, relying on *Ferrell* and the subsequent Fifth Circuit cases, ruled that "one's choice of hair style is constitutionally protected" and that the burden was upon school authorities to demonstrate that long hair resulted in disruption of the educational process. The district court held that:

> [I]f the school authorities [are] unable to support *factually* their rule, offering speculation only, the rule is • • • unreasonable and hence in v i o l a t i o n of the equal protection and/or due process clauses of the Fourteenth Amendment. • • • "The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process." *Griffin* v. *Tatum*, 5 Cir., 1970, 425 F. 2d 201, 203.

852: *Glover* v. *Pettey*, 5 Cir. 1971, ____ F. 2d ____ (No. 31,112, May 27, 1971).

In *Griffin* v. *Tatum*, 5 Cir. 1970, 425 F. 2d 201, modifying 300 F. Supp. 60, this court affirmed the right of "school authorities in this circuit • • • to promulgate reasonable regulations concerning hair styles". The court, however, affirmed as not being "clearly erroneous" the district court's judgment that application of the school's hair rule to Griffin's particular case was unreasonable.

In applying this test, the district court heard evidence from both parties. Witnesses for the defendant school board were three students, two teachers, two student activities directors, three assistant principals, four principals, and the school superintendent. All of these witnesses testified, in substance, that students with long hair caused distraction in the classroom, disciplinary problems, health problems, and safety problems.

Plaintiff called 17 witnesses on his behalf. Of these, three were members of the Karr family, and nine were students either at Coronado High or at other schools in the El Paso area. In the main, the students testified that they did not believe that long hair caused disciplinary problems, other than the problems created when attempts were made to enforce the hair length regulation. Several students did, however, acknowledge that they had witnessed or heard of fights between long and short-haired students. Also called was a former teacher who had taught high school in Austin, Texas, and in Oklahoma, who testified that she saw no rational basis for a hair-cut code. Finally, the plaintiff called three, "expert" witnesses — a psychologist, a college English teacher, and a college political science teacher. The essence of this "expert" testimony was that there is no correlation between hair length and conduct; that hair regulations may alienate students from school authorities; and that the regulations may adversely affect the parent-child relationship.

After hearing this conflicting evidence, the district court made findings of "fact". It concluded that "the

overwhelming preponderance of the relevant, credible evidence indicates *** that the presence and enforcement of the hair-cut rule causes far more disruption of the classroon instructional process than the hair it seeks to prohibit". The court then discussed each of the separate justifications proffered by the Texas school authorities. The court concluded that the contention of school authorities that long hair could be prohibited because it is difficult to keep clean was invalid because the length of hair is unrelated to "habits of personal hygiene one develops through parental training ***". The court held that a preponderance of the evidence supported the finding that long hair does not create a safety hazard in science laboratories. With regard to discipline, the court held that disciplinary problems were created not by the presence of long-haired students but by efforts to enforce the long-hair regulation. With respect to the undisputed testimony that fights had occurred between long and short-haired students, the court ruled that the proper course of action for the school board was to "[teach] tolerance" rather than banning long hair. Having found, as a matter of fact, that there was no reasonable relationship between the regulation and legitimate school board objectives, the court concluded as a matter of law that the regulation violated the Due Process and Equal Protection clauses of the Federal Constitution.

III.

In view of the district court's holding that the school board failed to sustain its burden of justification, this court is now called upon to decide the question which

it reserved in *Ferrell*: Is there a constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer? We hold that no such right is to be found within the plain meaning of the Constitution.

It has been argued that the First, Eighth, Ninth, Tenth, and Fourteenth Amendments and the penumbras therefrom supply a basis in the Constitution for such a right. We reject each of these theories; nevertheless, we shall consider each of them.

A. *The First Amendment.* — The most frequently asserted basis for a constitutional right to wear long hair lies in the First Amendment.[8] It is argued that the wearing of long hair is symbolic speech by which the wearer conveys his individuality, his rejection of conventional values, and the like. Accordingly, it is argued that the wearing of hair is subject to the protection of the First Amendment under the principles announced in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

We find considerable difficulty, however, with the First Amendment approach to this question. First, we think it doubtful that the wearing of long hair has sufficient communicative content to entitle it to the protection of the First Amendment. As the Supreme Court said in *United States* v. *O'Brien*, 391 U.S. 367, 376:

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[8]For a useful discussion of the First Amendment approach, see Note, 84 Harv. L. Rev. 1702, 1707-10 (1971).

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.

For some, no doubt, the wearing of long hair is intended to convey a discrete message to the world. But for many, the wearing of long hair is simply a matter of personal taste or the result of peer group influence.[6] Appellee Karr, for example, has brought this suit not because his hair conveys a message but "because I like my hair long". Surely if we are to have workable rules of constitutional law, the validity of the regulation cannot turn on the plaintiff's subjective motivation in wearing his hair long.

For these reasons, we think it inappropriate that the protection of the First Amendment be extended to the wearing of long hair. Moreover, it is our belief that the Supreme Court's decision in *Tinker* supports this view. In *Tinker*, three students were suspended for wearing to school black armbands to publicize their objection to Viet Nam hostilities. The court concluded that the wearing of armbands under such circumstances was closely akin to pure speech and thus fell within the ambit of the First Amendment. The court, however, clearly distinguished the case which we have here of hair and grooming regulations. It observed:

> The problem posed by the present case does not relate to regulation of the length of skirts

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[6] As one commentator has suggested, the wearing of long hair may well convey nothing more than contempt for traditional notions of good grooming. See id., at 1710, n. 37.

> or the type of clothing, to hair style, or deportment. * * * Our problem involves direct, primary First Amendment rights akin to "pure speech".[7]

The conclusion is inescapable that this paragraph was intended to delimit the outer reach of the court's holding. We read this language as indicating that the right to style one's hair as one pleases in the public schools does not inherit the protection of the First Amendment.

B. *Griswold.* — A second basis frequently asserted for such a constitutional right is found in an expansive reading of the Supreme Court's holding in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). In that case, the court invalidated a Connecticut statute forbidding the use of contraceptives on the ground that it unjustifiably infringed the right of marital privacy. It is argued that from this holding may be generalized a pervasive constitutionally protected zone of personal privacy which may be infringed only for compelling reasons. See e.g. *Bishop* v. *Colaw*, 8 Cir. 1971, ____ F. 2d ____, 40 L.W. 2296.

In our view, such a reading of *Griswold* is unwarranted. We think *Griswold* rested somewhat narrowly on the unacceptable intrusion in the privacy of the home which would have been required to enforce the Connecticut statute. In contrast, a regulation restricting the length of hair restricts privacy not at all. Hair is, of course, worn for all the world to see. We do not

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[7]305 U.S. 503, at 509.

think *Griswold* stands for any general "right to go public as one pleases".[8]

C. *Substantive Due Process.* — Rather than relying narrowly on *Griswold*, it may be argued more generally that the right to wear hair at any length inheres in the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment.[9] There is little doubt that the Due Process Clause has occasionally been relied upon in recent years as the source of substantive constitutional rights even where the rights were not specifically enumerated in the Bill of Rights. The right of marital privacy announced in *Griswold* is but one example of this recent emergence of substantive due process in the area of individual liberties. Other examples are the constitutional right to travel to foreign countries[10] and the right to travel interstate.[11] It is axiomatic, however, that federal courts should recognize such substantive constitutional rights only where "fundamental" individual liberties are at stake.[12]

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[8] *Richards* v. *Thurston*, 1 Cir. 1970, 424 F. 2d 1281, 1283.

[9] This is the basis on which the First Circuit underpins its decision invalidating high school hair regulations. See *Richards* v. *Thurston*, 1 Cir. 1970, 424 F. 2d 1281. The Seventh Circuit also appears to have accepted the substantive due process approach. See *Breen* v. *Kahl*, 7 Cir. 1969, 419 F. 2d 1034, cert. den. 398 U.S. 937 (1970).

[10] *Kent* v. *Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed. 2d 1204 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964).

[11] *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969).

[12] We reject the argument made by the First Circuit that:

> [L]iberty seems to us an incomplete protection if it encompasses only the right to do momentous acts * * *. We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the

We think it plain that individual liberties may be ranked in a spectrum of importance. At one end of the spectrum are the great liberties such as speech, religion, and association specifically guaranteed in the Bill of Rights. Of equal importance are liberties such as the right of marital privacy that are so fundamental that, even in the absence of a positive command from the Constitution, they may be restricted only for compelling state interests. At the other end of the spectrum are the lesser liberties that may be invaded by the state subject only to the same minimum test of rationality that applies to all state action. See, e.g., *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).

The question before this court is where on the spectrum lies the asserted right of a high school student to wear hair in school at the length that suits him. It is our firm belief that this asserted freedom does not rise to the level of fundamental significance which would warrant our recognition of such a substantive constitutional right. We are influenced in this decision by numerous factors. First, the interference with liberty is a temporary[13] and relatively inconsequential

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right to wear one's hair as he wishes. *Richards* v. *Thurston*, 1 Cir. 1970, 424 F. 2d 1281, 1285.

The due process clause does, of course, protect freedoms "great and small" from wholly arbitrary state action. But it is only when "fundamental" liberties are at stake that we place upon the state a "substantial burden of justification" for the infringement of liberty.

[13]It seems to us patently absurd to suggest that our decision here today provides a basis for sustaining a state regulation requiring conventional haircuts for the general adult population. See *Richards* v. *Thurston*, 1 Cir. 1970, 424 F. 2d 1281, 1285, & n.10; see also *Ferrell* v. *Dallas Indep. School District*, 393 U.S. 856, denying cert. to 392 F. 2d 697 (5 Cir. 1968) (dissenting opinion of Mr. Justice Douglas).

one. The regulation in question does, after all, leave these students a rather wide range of personal choice in their dress and grooming. We do not have here "a nation bent on turning out robots * * * insist[ing] that every male have a crew cut and every female wear pigtails".[14] Secondly, we feel compelled to recognize and give weight to the very strong policy considerations in favor of giving local school boards the widest possible latitude in the management of school affairs. School administrators must daily make innumerable decisions which restrict student liberty. The briefs in this case afford an interesting sampling of the kinds of restrictions which have been held valid in the Texas state courts. Examples are regulations requiring students to park automobiles in a designated parking lot and not move them until a designated hour;[15] forbidding students from leaving school grounds during recess and noon hour;[16] prohibiting membership in high school fraternities and sororities;[17] forbidding students from taking lunch except from the school cafeteria.[18] Each of these regulations imposes restrictions on student liberty at least as substantial as the regulation here in question. It would require little imagination to formulate an equally plausible due process attack on the validity of each restriction. Does it follow that school officials should be called into federal court

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[14] *Ferrell* v. *Dallas Indep. School District*, 393 U.S. 856, denying cert. to 392 F. 2d 697 (5 Cir. 1968) (dissenting opinion of Mr. Justice Douglas).

[15] *McLean Independent School District* v. *Andrews*, 333 S.W. 2d 886.

[16] *Bozeman* v. *Morrow*, 34 S.W. 2d 654.

[17] *Wilson* v. *Abilene Independent School District*, 190 S.W. 2d 406.

[18] *Bishop* v. *Houston Independent School District*, 29 S.W. 2d 312.

and given the burden of demonstrating "factually" that these restrictions serve "compelling" interests and that no "alternatives less restrictive of liberty" are available? We think not.

Federal courts, and particularly those in this circuit, have unflinchingly intervened in the management of local school affairs where fundamental liberties, such as the right to equal education, required vindication. At times that intervention has, of necessity, been on a massive scale. But in the grey areas where fundamental rights are not implicated, we think the wiser course is one of restraint.

D. *Equal Protection.* — The court below held that the denial of free public education to Karr on the basis of the length of his hair was an arbitrary classification which violated the Equal Protection clause of the Constitution.

The Equal Protection clause has not generally been relied upon as a basis for invalidating hair-length regulations with the exception of a Seventh Circuit case which held that hair regulations are violative of the Equal Protection clause because they apply solely to male students and not to female students.[19] In this case, however, the theory of the district court is that, as between male students, any classification based upon hair length contravenes the Equal Protection guarantee.

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[19] *Crews* v. *Cloncs*, 7 Cir. 1970, 432 F. 2d 1259, 1266.

We find this theory without merit. This classification is not based on the "suspect" criterion of race[20] or wealth[21] which would require aplication of the "rigorous" standard of equal protection scrutiny. Accordingly, the classification is invalid under the Equal Protection clause only if this court can perceive no rational basis on which it is founded. *Walters* v. *City of St. Louis*, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505. For reasons set forth in Section IV of this opinion, it is clear that the classification meets this standard of review.

IV.

In view of our holding that there is no substantial constitutional right to wear hair in the fashion that suits the wearer, the conclusion is inescapable that the district court erred in enjoining enforcement of the Coronado High School hair regulation.

Relying on *Ferrell*, the district court ruled that the right to wear hair long in public high schools is constitutionally protected and that the school board bore a substantial burden of justification that could be met only by demonstrating factually the necessity for the regulation. This ruling represented an erroneous assessment of the burden of proof and an erroneous standard of judicial review. State regulations which do not affect fundamental freedoms are subject to a much less rigorous standard of judicial review than is applicable when such fundamental rights are

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20 *Korematsu* v. *United States*, 323 U.S. 214 (1944).

21 *Harper* v. *Virginia State Board of Elections*, 86 S.Ct. 1079, 383 U.S. 663, 16 L.Ed. 2d 169.

at stake. In such cases, the appropriate standard of review is simply one of whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488, 99 L.Ed. 563, 574, 75 S.Ct. 461; *Ferguson v. Skrupa*, supra. Moreover, the burden is not upon the state to establish the rationality of its restriction, but is upon the challenger to show that the restriction is wholly arbitrary.[22]

In this case, it is evident from the record that the school authorities seek only to accomplish legitimate objectives in promulgating the hair regulation here in question. The record nowhere suggests that their goals are other than the elimination of classroom disruption, the avoidance of violence between long- and short-haired students, the elimination of potential health hazards, and the elimination of safety hazards resulting from long hair in the science labs. On a record such as this, we hold that it was clear error to conclude that the school board regulation failed to meet the minimum test of rationality that was properly applicable.

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[22] See *Bibb v. Navajo Freight Lines, Inc.*, 79 S.Ct. 962, 359 U.S. 520, 3 L.Ed. 2d 1003 (1959) (Highway safety measure enacted by a state carry a strong presumption of validity); *West Coast Hotel Co. v. Parrish*, 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703 (1937) (Every presumption favors validity of legislative enactment and though court may hold views inconsistent with wisdom of law, it may not be annulled unless palpably in excess of legislative power).
Commission of Oklahoma v. Lowe, 50 S.Ct. 367, 281 U.S. 431, 74 L.Ed. 945 (1930) (It is to be presumed that state in enforcing local policies will conform its enforcement to federal guaranties).

ple. Rather, it reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in every matter great and small. The regulations which impinge on our daily affairs are legion. Many of them are more intrusive and tenuous than the one involved here. The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could ever enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life.

REVERSED.

BELL, Circuit Judge, CONCURRING SPECIALLY:

I concur in the result that this case on the facts of record does not present a substantial federal question, and that the decision of the district court should be reversed.

I also concur in so much of the prevailing opinion as stands for the proposition that dress codes of the type in question are to be tested on a rational basis standard, i.e., whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective.

This means, as I understand the prevailing opinion, that the burden is on one objecting to a hair regulation to allege and prove that the regulation is arbitrary or that it has been arbitrarily applied; otherwise, the

federal courts are not to intrude into school affairs of this nature. The proof here did not rise to that level. The findings of the district court to the contrary are clearly erroneous.

The burden of proof — arbitrary standard — rational basis frame of reference is explicated by the knowledge that we have previously equated arbitrariness with an absence of rational basis. In *Bicknell v. United States*, 5 Cir., 1970, 422 F.2d 1055, it was said: "... In the law arbitrary ... means 'having no rational basis.'" 422 F.2d at 1057.[1]

We have previously given effect to the rational basis test, *Stevenson v. Board of Education of Wheeler County, Georgia*, 5 Cir., 1970, 426 F.2d 1154, 1158, cert. den., 400 U.S. 957, (1970), and also to the due process and equal protection proscription of arbitrary application, *Griffin v. Tatum*, 5 Cir., 1970, 425 F.2d 201, 203. It is the element of arbitrariness which has not been made clear in our previous cases involving the validity vel non of school dress codes. This perhaps led the district court into error in assessing the thrust of the facts adduced to the extent of erroneously finding a substantial federal question.

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[1]The rule of placing the burden on those objecting to a dress code to show that the code is arbitrary is analogous to the rule which is followed in zoning cases. In each instance the police power is involved. The decision of local zoning authorities is clothed with a presumption of validity and can be overcome only by a showing of arbitrariness. *Shenk v. Zoning Commission of District of Columbia*, D.C. Cir., 1971, 440 F.2d 295, 297; *Diedrich v. Zoning Commission of the District of Columbia*, D.C. Cir., 1968, 393 F.2d 666. Cf. *Goldblatt v. Town of Hempstead*, 1962, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130.

WISDOM, Circuit Judge, with whom BROWN, Chief Judge, THORNBERRY, GOLDBERG, and SIMPSON, Circuit Judges join, dissenting:

Hair styles change. A high school boy if he chooses should be able to wear his hair as Yul Brynner does or as Joe Namath does without fear of being deprived of an education by a majority of school board members who grew up at a time the crew-cut was fashionable.

Individual rights never seem important to those who tolerate their infringement. Yet the Bill of Rights and the Fourteenth Amendment were designed to limit the reach of majority control over fundamental personal rights. Many young men and boys regard long hair as an expression of affinity with their peers and disapproval of the older generations' handling of the Vietnam War and current social problems. Some may wear their hair long because the girls like it long. Either way, the right to wear one's hair as one pleases is a fundamental right implicit "within the commodious concept of liberty, embracing freedoms great and small". *Richards v. Thurston*, 1 Cir. 1970, 424 F.2d 1281.

Today a majority of this Court assembled en banc holds that it is but a trifling interference with a young person's freedom to deny him the right to wear his hair as he pleases. The Court apparently takes its cue from the late Mr. Justice Black's suggestion that the only "serious" aspect of a "long hair case" is "the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students

should wear". The Court tells us that hair length is not a "fundamental" matter, and with a few pecks at the typewriter advises the district courts of this circuit that they no longer need distract themselves with lawsuits of the gossamer stuff of this one. With due respect for our late Circuit Justice[1] and for my Brethren on this Court, I cannot subscribe to today's decision. In it, I discern no tenable explanation for the Court's holding that the interest in governing one's own personal appearance is an insubstantial interest unprotected by the Constitution.

I.

I begin with the premise that the Bill of Rights is not a comprehensive catalogue of all the specific rights possessed by the people of this nation against the fed-

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[1] I am still unwilling to ascribe a similar view to the Supreme Court as a whole. It is true that the Court has only recently refused to grant certiorari in a "long hair" case arising in the Tenth Circuit. Freeman v. Flake, *1972, 40 U.S.L.W. 3468, den'g cert. from* 448 F.2d 258. Mr. Justice Douglas dissented from the denial of certiorari, as he had earlier this Term in Olff v. East Side Union High School District, 1972, 40 U.S.L.W. 3332.

Under any circumstances, 'the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. . . .' United States v. Carver, 1923, 260 U.S. 482, 490, 67 L.Ed. 361, 364. See generally Stern and Gressman Supreme Court Practice § 5.7, and cases cited. It is particularly fitting to recall this maxim when "[t]he federal courts are in conduct and the decisions in disarray," as they are in their treatment of the problem before us today. The Supreme Court is responsible for ensuring that constitutional rights are uniform throughout this nation; it is hard to believe that the Court will close its eyes eternally to the disparate recognition now being given the constitutional rights of students who quite fortuitously inhabit different judicial circuits.

eral government. Indeed, Madison introduced the Ninth Amendment to the Constitution in response to the arguments of Hamilton and others that the enactment of a Bill of Rights was dangerous: dangerous because an enumeration of the people's rights might suggest "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." I Annals of Congress 439 (Gales and Seaton ed. 1834). Thus the Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Bill of Rights, then, does not provide an exhaustive list of the rights of the American people to freedom from government interference. I see no hint that today's majority disagrees with that conclusion. Nor do my Brothers dispute the suggestion that the Bill of Rights also provides no complete index of the rights guaranteed by the Due Process Clause against invasion by the states. Instead, the Court takes the position that there are at least some personal rights protected from state interference though not specifically sheltered by provisions of the Bill of Rights. The Court does not say so, but it apparently reaches this conclusion through the Due Process Clause directly, as Mr. Justice Harlan would have; or through the Due Process Clause read in light of the Ninth Amendment, in the fashion suggested by Mr. Justice Goldberg's opinion in *Griswold v. Connecticut*, 19 , 381 U.S. 479.

I join the Court's statement that "federal courts should recognize ... substantive constitutional rights only where 'fundamental' individual liberties are at stake." But in determining whether this particular liberty is "fundamental" or not, the majority and I part company.

The majority establishes a "spectrum" of values along which individual liberties may be "ranked", and proceeds to "rank" a high school students' right to determine the length of his hair along with "the lesser liberties that may be invaded by the state subject only to the same minimum test of rationality that applies to all state action." We are told that "numerous factors" explain this ranking, but when the dust has settled the Court adduces only two "factors" in support of its decision to withhold recognition to this right as fundamental.

First, the Court says, "the interference with liberty is a temporary and relatively inconsequential one" which "leave[s] these students a rather wide range of personal choice in their dress and grooming." I fail to see what the duration of this limitation on personal freedom has to do with its seriousness. For many students, however, hair regulations will restrict their personal appearance for four, or even six years. That is hardly a de minimis restriction, if indeed our Constitution can be construed to overlook "small" infringements of constitutionally guaranteed interests. And I do not think it can. Moreover, if the "temporary" aspect of these regulations is what prevents them from

infringing fundamental human rights, I suppose that today's decision would authorize a city ordinance on hair regulations for the general adult population limited in duration to, say, the summer months. Most important, though, the "wide range of choice" which students supposedly retain is substantially reduced by today's decision, which strikes from the district court dockets all complaints which "[allege] the Constitutional invalidity of a high school hair and grooming regulation." The Court has given the public high schools in this Circuit a green light to ban jeans, T-shirts, sandals, wide ties, maxi skirts, "distractingly" colorful garb of all kinds — in short, the chosen attire of many of our young people. Indeed, as I read the Court's opinion, it precludes constitutional examination of a public high school requirement of a daily uniform dress. And yet, to justify today's per se rule, the Court assures us that students retain considerable latitude in determining their own dress and appearance.

I am equally unpersuaded by the Court's argument that hair regulations are constitutionally unassailable because (superficially) they resemble a number of other restrictions on student liberty. This test of "inverse quantitative insubstantiality" has an imposing, reverberative resonance, but so far as I am aware, it is a novel test for the resolution of important constitutional issues. After a nod in the direction of school board autonomy, the Court acknowledges that the real basis for its second rationale is the spectre of school officials being ruled into court to justify the restrictions which they impose on their students. As if desegregation were

not enough for school officials to worry about! It is true that the Court's decision aborts the development of potentially far-reaching litigation over the rights of students, but these considerations do not explain the Court's belittling characterization of a young person's right to present himself to the world as he pleases so long as he causes no one any harm. Almost every day, the federal courts spawn new classes of litigation — most recently, perhaps, litigation over the constitutional rights of women. Regrettable as the overcrowding of our dockets may be, in and of itself the prospect of exacerbating that condition is no reason to blink a violation of a liberty which obviously means a great deal to many young people. Thus the Court's second justification for concluding that hair rules do not infringe fundamental liberties is but a statement of certain constitutionally irrelevant consequences of its decision. It is by no means a true justification for the conclusion the Court reaches.

To me the right to wear one's hair as one pleases, although unspecified in our Bill of Rights, is a "fundamental" right protected by the Due Process Clause. Hair is a purely personal matter — a matter of personal style which for centuries has been one aspect of the manner in which we hold ourselves out to the rest of the world. Like other elements of costume, hair is a symbol: of elegance, of efficiency, of affinity and association, of non-conformity and rejection of traditional values. A person shorn of the freedom to vary the length and style of his hair is forced against his will to hold himself out symbolically as a person holding ideas contrary, perhaps, to ideas he holds most

dear. Forced dress, including forced hair style, humiliates the unwilling complier, forces him to submerge his individuality in the "undistracting" mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual. I always thought this country does not condone such repression.

My differences with the Court's understanding of "fundamental" rights are differences of legal attitude and philosophy. Judge Learned Hand once described "fundamental" as a word "whose office usually, though quite innocently, is to disguise what [judges] are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." L. Hand, The Bill of Rights 70 (1958). I am sure Judge Hand would agree that his comments are equally applicable to judges' *refusal* to attach the "fundamental" label. For me, though, hair length regulations impinge upon the "fundamental" diversity, freedom, and expressiveness of our society, no small portion of which is comprised of students in our public schools.

II.

I disagree strongly with the majority's disposition of the equal protection issue. The district court held that the hair regulation in question created two classes of citizens: those who are denied the public education guaranteed them by the Texas Constitution, and those who receive that education. The defining characteristic of the deprived class is that it is composed of

males whose hair exceeds the length specified by the regulation at issue. Unimpeachably, the district court reasoned that "any distinction between those who receive this right [to a free public education] and those who do not must have a reasonable basis and must reasonably relate to the purpose for which the classification is made." After detailed consideration of the evidence, the district court concluded that the distinction drawn by their hair regulation "has *no reasonable relationship to its professed purposes* or to the educational process as a whole." The district court found that "the classification established by the hair regulation is utterly unreasonable" and therefore that it violated the Equal Protection Clause of the United States Constitution.

The majority disposes of this finding by ignoring it. The Court adopts a framework of Equal Protection analysis that is, with all respect, just dead wrong. For purposes of argument, let us assume that the Court's denial of the "rigorous" standard of Equal Protection review is required here, and let us acknowledge that "the classification is invalid under the Equal Protection clause only if this court can perceive no rational basis on which it is founded." So far so good. But the Court departs from the proper analytic framework when, in part IV of its opinion, it states that "the appropriate standard of review is simply one of whether the regulation is *reasonably intended* to accomplish a constitutionally permissible state objective." (emphasis added). The Court accepts a test for rationality which looks exclusively to the intentions or goals of those who enact a law or promulgate a regulation. This

sidestep frees the Court from dealing with the district court's specific and heavily factual finding that this hair regulation completely fails to accomplish its stated objectives. Thus the Court concludes:

> In this case, it is evident from the record that the school authorities *seek* only to accomplish legitimate objectives in promulgating the hair regulation here in question. The record nowhere suggests that their *goals* are other than the elimination of classroom distraction, the avoidance of violence between long and short haired students, the elimination of potential health hazards, and the elimination of safety hazards resulting from long hair in the science labs.

But the goals of the school authorities have nothing at all to do with the resolution of this case, in view of the district court's explicit finding that "the distinction drawn has no reasonable relationship to its professed purposes." The motivations, goals, purposes, or objectives of those who enact laws may help courts to understand the effects of those laws. See *Hall v. St. Helena Parish School Board*, E.D. La. 1961, 197 F. Supp. 649, *aff'd per curiam* 368 U.S. 515 (1962); *Davis v. Schnell*, S.D. Ala., 81 F. Supp. 872, *aff'd per curiam* 336 U.S. 933 (1949); *Poindexter v. Louisiana Financial Assistance Commission*, E.D. La. 1967, 275 F. Supp. 833, *aff'd per curiam*, 389 U.S. 571 (1968). See Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887 (1970). But it has never been held that "a legislative act may violate equal

protection solely because of the motivations of the men who voted for it." *Palmer* v. Thompson, [illegible] 403 U.S. 217, 224. [illegible] S.Ct. [illegible] L.Ed.2d [illegible]. Given this premise, the failure of a law or regulation to achieve constitutionally permissible objectives surely cannot be cured by the good intentions of those who enact it.

Instead, the proper inquiry is to evaluate the classification actually created by a statute or regulation in light of its avowed or readily discernible objectives. As Chief Justice Burger stated for the Supreme Court only a few weeks ago, the Equal Protection Clause withholds from the states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation* to the object of the legislation'" *Reed* v. *Reed*, 40 U.S.L.W. 4011, 4013 (Dec. 22, 1971).

Reed and all its forebears make clear that the majority today has not addressed itself to the question before us on this appeal, namely, whether denying a public high school education to a young man because he has long hair does in fact — not in hope, supposition, or theory — bear "a fair and substantial relation" to the objectives of the regulation. The district court carefully considered each of the objectives proffered by the school authorities in this case. In light of the evidence presented to it, the district court concluded that

ableness. How is today's sleight of hand achieved? By sugaring over with talk of "good intentions" the total failure of this regulation to carry those intentions into effect. I dissent from this novel and unexplained method of writing the Equal Protection Clause out of our Constitution even if it threatens to impose on this Court the task of bringing to fruition the full spectrum of rights which high school students enjoy with all other Americans.

I ask: What is the important state interest that permits a public school board to deny an education to a boy whose hair is acceptably long to his parents but too long to suit a majority of the School Board of El Paso, Texas?

I submit that under the First and Fourteenth Amendments, if a student wishes to show his disestablishmentarianism by wearing long hair or has the whim to wear long hair, antidisestablishmentarians on public school boards have no constitutional authority to prevent it.

GODBOLD, Circuit Judge, with whom BROWN, Chief Judge, THORNBERRY and SIMPSON, Circuit Judges join, dissenting:

I would continue to apply in this case, as we have in the past, the standards of *Stevenson v. Board of Education of Wheeler County*, 426 F.2d 1154 (5th Cir. 1970), and *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir.), *cert. denied*, 396 U.S. 856 (1968). Under those standards, and Fed. R. Civ. P.

Rule 52(a), we are required to affirm the District Court. Our duty to follow Rule 52(a) is no less stringent in the rare case — like this one — in which the district court has found a hair or dress regulation unconstitutional as it is in the much more frequent cases in which district courts have upheld regulations. In the tension between, at one end, a compelling desire to get the courts out of hair cases by the promulgation of new law if necessary, and, at the other end, to expand the scope of protection accorded to students by our prior decisions, what has dropped out of sight is that the standards already established in this Circuit, plus the finding of the District Court that the regulation in question has no reasonable relation to its professed purpose or to the educational process as a whole, should be the end of this case. I would affirm the District Court and stick to the task of deciding cases as they are presented to us.

RONEY, Circuit Judge, dissenting:

I dissent on a very narrow ground. I would hold that there is a Federal Constitutional question involved where students have virtually no choice as to what school they will attend for public education through the high school level, resulting as a practical matter in compulsion by the government, *and* where the school hair-length regulation follows them out of the school house door.

As other courts have had occasion to note, a student can indulge in most vagaries of dress and behavior during non-school hours and then abandon them at the

schoolhouse steps, but he cannot grow and ungrow his hair. *Breen v. Kahl*, 419 F.2d 1034, 1038 (7th Cir. 1969);[1] *Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970);[2] *Westley v. Rossi*, 305 F.Supp. 706, 713 (D. Minn. 1969);[3] *Dunham v. Pulsifer*, 312 F.Supp. 411, 419 (D. Vermont 1970).[4] Thus, a regulation requiring a student to shorten his hair effects a substantial intrusion into his private life in a way that is important to him, where the school board has no authority or reason to interfere.

It is precisely this kind of intrusion into the private lives of citizens which the Ninth Amendment was designed to protect against. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

1"... it would be impossible to comply with the long hair regulation during school hours and follow the wishes of the students and their parents as to hair length outside of school..."

2"... a school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student seven days a week, nine months a year."

3"The rule here has effect beyond school, so were a school to prohibit a boy attending school with no shirt and bare to the waist, if he desires to go bare waisted in life at home or beyond the school he may take off the shirt as he leaves the school grounds. Such is not the case with hair... The hair restriction ... invades private life beyond the school jurisdiction."

4"Garments can be changed at will whereas hair, once it is cut, has to remain constant for substantial periods of time."

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 31045

D. C. Docket No. CA 70-EP-229

CHESLEY KARR, a minor, Individually and JOHN R. KARR, Individually and as next friend and Guardian-Ad-Litem on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

versus

CLIFFORD SCHMIDT, Principal of CORONADO HIGH SCHOOL, *et al.*, etc.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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Before BROWN, *Chief Judge*, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM, and RONEY, *Circuit Judges.*

JUDGMENT ON PETITION FOR REHEARING EN BANC

This cause came on to be heard en banc on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed by the Court en banc;

It is further ordered that plaintiffs-appellees pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

April 28, 1972

BELL, *Circuit Judge*, CONCURRING SPECIALLY:

WISDOM, *Circuit Judge*, with whom BROWN, *Chief Judge*, THORNBERRY, GOLDBERG, and SIMPSON, *Circuit Judges* join, dissenting:

GODBOLD, *Circuit Judge*, with whom BROWN, *Chief Judge*, THORNBERRY and SIMPSON, *Circuit Judges* join, dissenting:

RONEY, *Circuit Judge*, dissenting:

Issued as Mandate: